

EXTERNAL AFFAIRS AND FEDERALISM IN THE TASMANIAN DAM CASE

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As a result of *Commonwealth v. Tasmania* (the Tasmanian Dam case)¹, the broad view of the Commonwealth's legislative competence to implement treaties under the external affairs power in s. 51(29) of the Constitution has been established. The members of the majority² founded their argument on canons of constitutional interpretation deriving from the decision in *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.* (The *Engineers case*).³ In their attempt to justify a more restrictive view of s. 51(29), the minority⁴ referred to general reasoning and implications arising from their conception of the federal nature of the Constitution.

What this article offers is a view of the merits of the competing approaches — federal considerations contra *Engineers* principles — advanced with respect to the meaning of s. 51(29)⁵.

Pattern of Argument

The majority in the *Tasmanian Dam case*, following three of their number in the majority in *Koowarta v. Bjelke-Peterson* (*Koowarta*),⁶ determined that entry into an international agreement by the executive in itself pertains to external affairs, so that s. 51(29) is available to give effect legislatively to the terms of the agreement within Australia. There is no overriding requirement that the subject matter of the agreement must be indisputably international in character or of international concern.

This broad view⁷ is arrived at by a sequence of propositions, summarized as follows. The external affairs power in s. 51(29) is plenary and independent. It should be given its natural meaning, bearing in mind that Commonwealth grants of power are to be liberally and broadly interpreted. When the executive enters into international agreements it is prosecuting the external affairs of the nation: those agreements concern our relations with other countries, and render the Commonwealth liable in international law to those countries. To give effect to such agreements by legislation is a matter of external affairs

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1. (1983) 46 A.L.R. 625.

2. Mason, Murphy, Brennan and Deane JJ.

3. (1920) 28 C.L.R. 129.

4. Gibbs C.J., Wilson and Dawson JJ.

5. This article does not attempt to address the other issues and holdings in the *Tasmanian Dam case*. For commentaries on the case as a whole, refer to M. Coper, 'Commentary' in *The Franklin Dam Case*, (1983); J. Goldring, 'Dams or Floodgates?', (1983) 8 *Legal Service Bulletin* 156; P.H. Lane, 'The Federal Parliament's External Affairs Power: The Tasmanian Dam Case', (1983) 57 A.L.J. 554; L. Zines, 'Implications of the Tasmanian Dam Case', *Papers presented at the Twenty-Second Australian Legal Convention*, Law Council of Australia, (1983), at 215-8.

6. (1982) 39 A.L.R. 417. The three members of the majority referred to are Mason, Murphy and Brennan JJ.

7. *Tasmanian Dam case*, *supra* n.1 at 688-97 (Mason J.), 726-34 (Murphy J.), 769-74, 782-3 (Brennan J.), 801-7, 812-3 (Deane J.); *Koowarta*, *supra* n.6 457-67 (Mason J.), 469-73 (Murphy J.), 482-8 (Brennan J.).

because it effectuates those relations with other countries. The power in s. 51(29) has the high constitutional purpose of enabling the Commonwealth to fully participate in world affairs. It is impermissible to curtail s. 51(29) by having regard to its impact on the States' legislative authority, for that is to resurrect the discredited doctrine of State reserved powers.

The minority in the *Tasmanian Dam case* reluctantly abandoned, as having been precluded by *Koowarta*, the view that the subject matter of an international agreement would only come within the external affairs power if the manner in which it was treated involved a relationship with countries, persons or things outside Australia.⁸ But they fell back to the position of the fourth majority justice in *Koowarta*, Stephen J., in requiring that the subject matter should evince the quality of being of international concern.⁹

Their approach¹⁰ requires that s. 51(29) be read down at the outset, in a way not compelled by the express terms of the power, as a result of recourse to an *a priori* conception of federalism. On the basis of the federal character of the Constitution and the distribution of powers which it effects, the restrictive interpretation is developed. The federal balance of the Constitution, it is said, would be destroyed if the external affairs power enabled the Commonwealth to implement any international agreement, regardless of subject matter. The assignment of carefully limited legislative power to the Commonwealth Parliament would be rendered otiose if s. 51(29) were construed as allowing a universal power of legislation. Indeed the federal nature of the polity, the very survival of a federal Commonwealth, would be endangered if s. 51(29) were given the broad operation contended for.

Engineers and Federalism

Argument from these federal considerations presumes that the *Engineers case* in its literalist outlook, enjoining one to apply 'the natural meaning of the text of the Constitution' and to proceed 'on the ordinary lines of statutory construction',¹¹ does not adequately recognize that the Constitution is a federal instrument and that federal principles pervade its structure. Certainly the joint judgment in the *Engineers case* is not replete with general discussion of federalism, but that was because the justices were intent on repudiating wide and vague federal implications, in particular the doctrines of immunity of instrumentalities and implied prohibitions,¹² as permissible bases for constitutional interpretation of the Commonwealth's legislative powers.

8. This view had commended itself to the *Koowarta* minority of Gibbs C.J., Aickin and Wilson JJ.

9. Some serious difficulties inhere in this requirement of 'international concern'. There is much force in the argument that the existence of an international agreement *per se* demonstrates that its subject matter is of international concern (see *Koowarta*, *supra* n.6 at 463-4 per Mason J., 487 per Brennan J.; *Tasmanian Dam case*, *supra* n.1 at 691 per Mason J., 771 per Brennan J.). If something else beyond the agreement is required the question becomes one of degree, of whether the subject matter of the agreement is of 'sufficient' international concern. But no objective or instructive criteria can be satisfactorily enunciated to ascertain when such a requirement of international concern has been met (see *Koowarta*, *supra* n.6 at 463-4 per Mason J., 473 per Murphy J.; *Tasmanian Dam case*, *supra* n.1 at 689-92 per Mason J.). For those adopting a stringent approach, sufficiency of concern would have to be shown by evidence of extensive international action and participation (e.g., *Tasmanian Dam case*, *supra* n.1 at 670 per Gibbs C.J., 750 per Wilson J., 848 per Dawson J.); for those who regard the requirement as a liberal one, not much beyond the existence of the agreement would be needed (e.g., *Tasmanian Dam case*, *supra* n.1 at 732 per Murphy J., 771 per Brennan J.). And asking the Court to decide whether the subject matter of an international agreement is of international concern is to require the Court to review the conduct of Australia's foreign relations, to substitute its judgment for that of the government and parliament in sensitive political issues (see *Koowarta*, *supra* n.6 at 463 per Mason J.; *Tasmanian Dam case*, *supra* n.1 at 691-2 per Mason J., 771-2 per Brennan J.).

10. *Tasmanian Dam case*, *supra* n.1 at 666-75 (Gibbs C.J.), 752-3 (Wilson J.), 836-45 (Dawson J.); *Koowarta*, *supra* n.6 at 429-42 (Gibbs C.J.), 448-54 (Stephen J.), 476-82 (Wilson J.).

11. *Engineers case*, *supra* n.3 at 142, 150.

12. For discussion of these doctrines and their development by the pre-*Engineers* High Court, refer to C. Howard, *Australian Federal Constitutional Law*, (1972), at 47-64, and L. Zines, *The High Court and The Constitution*, (1981), at 1-7.

The *Engineers case* is founded on an understanding that the federal scheme of the Constitution best emerges from a natural reading of the provisions contained in the Constitution itself. The federalism, then, is manifested in the express terms of the Constitution; in giving effect to those terms according to a natural reading their authentic constitutional meaning is attained. For the court, the task is one of 'finding the intention from the words of the compact', of allowing the Constitution to 'speak with its own voice'.¹³ There is no warrant to construct vague federal implications to supplement the text; that only leads to 'divergencies and inconsistencies more and more pronounced as the decisions accumulate'.¹⁴ And there is no need to restrain Commonwealth power by such implications, because the grants in s. 51 are 'subject to this Constitution', that is, subject to express limitations and guarantees in the other sections.

This understanding apparent in the *Engineers case* gains much support from an examination of the Constitution: there is a whole system of express constitutional provisions based on federal considerations or advancing some federal policy.¹⁵ Some particularly salient aspects may be mentioned. In Chapter 5 of the Constitution, 'The States', a number of matters concerning Commonwealth-State governmental relations are dealt with. Provision is made for the continuance of State constitutions, powers and laws, subject to the Constitution itself (ss. 106-108), for the paramountcy of Commonwealth law (s. 109), and for the immunity of property of one level of government from taxation by the other (s. 114). Further sections in the Chapter impose duties on one level of government to the other (ss. 119, 120) and provide federal guarantees (ss. 117, 118). Chapter 4 of the Constitution, 'Finance and Trade', contains detailed provisions for the financial relations between Commonwealth and States (ss. 87, 93-96, 99, 105), and prescribes rules for the federal concerns of inter-State trade (ss. 92, 98-100) and customs, excise and bounties (ss. 88-91). In the catalogue of Commonwealth legislative powers in s. 51, there are limits or qualifications on particular heads of power to effectuate federal purposes. Some grants exempt certain State functions from their purview (s. 51(13), (14)), prohibit discrimination between States or parts of States (s. 51(2)), require uniformity throughout the Commonwealth (s. 51(3)), restrict themselves to inter-State aspects (s. 51(1), (35)), guarantee just terms for acquisition of state property (s. 51(31)), and allow for legislative interaction between Commonwealth and States (s. 51(33), (34), (37), (38)). Consequently, as Sawyer suggests, '... there was good ground for treating the Australian Constitution as constituting its own definition of federalism, so as to require no supplementation from any general judicial concept of federal relations'.¹⁶

What is at issue then in a competition between *Engineers* principles and federal considerations is how the federal principle is to be applied, not whether it is to be applied at all. The problem in the *Tasmanian Dam case* is how far federal implications may be legitimately relied upon in interpretation of the Constitution.

It is of course true that the *Engineers case* did not maintain that no implications, federal or otherwise, were to be drawn from the Constitution. The making of implications — drawing inferences, ascertaining implied meaning — is required by legal rules of construction and common sense, is essential to all human reasoning.¹⁷ The *Engineers case*

13. *Engineers case*, *supra* n.3 142, 160.

14. *Ibid.* at 145.

15. In this respect our Constitution is unlike that of the United States. The elaboration of federal implications doctrines in the United States — influential in pre-*Engineers* decisions — is then no compelling argument for the same procedure here. See G. Sawyer, 'Implications and the Constitution', (1948-9) 4 *Res Judicatae* 15, 85 at 86-8.

16. G. Sawyer, *Australian Federalism in the Courts*, (1967), at 122.

17. *Ibid.* at 101. And Zines, *The High Court and the Constitution*, *supra* n.12 at 11.

allowed that implications might be drawn from the express terms of the constitution.¹⁸ What the case disapproved of were broad implications, not derived from express terms but from an *a priori* conception of the general nature of federalism. Such implications were criticized for their vagueness and their subjectivity, having no readily determinable operation and varying with the political theory of federalism held by individual judges.¹⁹ Referring to the implied prohibitions doctrine of the earlier decisions, the *Engineers case* argued:

It is an interpretation of the Constitution depending on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, nor referable to any recognized principle of the common law of the Constitution, and which, when stated, is rebuttable by an intention of exclusion equally not referable to any language of the instrument or acknowledged common law constitutional principle, but arrived at by the court on the opinions of judges as to hopes and expectations respecting vague external conditions.²⁰

Other Authorities and Federalism

In *Melbourne Corporation v. Commonwealth* (the *Melbourne Corporation case*),²¹ a limited revival of the pre-*Engineers* reasoning took place with the espousal of some inter-governmental immunity rules based on conceptions of the proper relationship of governments in a federal system. The case has been hailed as the modern embodiment of the argument from the nature of federalism,²² both for its result restraining s. 51(13) and for the general federal rhetoric it contains. But the *Melbourne Corporation case* should not be viewed as authority for unrestricted reasoning from federal postulates. Still less can the case be used to justify the procedure of reading down Commonwealth powers at the outset by recourse to federal notions.

From the *Melbourne Corporation case* emerge these doctrines:²³ firstly, the Commonwealth cannot enact a law which discriminates against or singles out a State by imposing any special liability or burden upon it; secondly, the Commonwealth cannot by its legislative power threaten the continued existence of a State or its capacity to function as an independent entity.

Attempts at reasoning expansively from the *Melbourne Corporation case* neglect that what were being enunciated were inter-governmental immunity rules, capable of reciprocal operation, functioning across power. The case dealt with the effect of Commonwealth laws addressing a command to the States, not with the consequences of Commonwealth law on the States' legislative sphere of competence: 'it concerned the States as objects of Commonwealth legislation, not as competing legislative authorities'.²⁴ There is no warrant

18. As may be seen from the following passage in the *Engineers case*, *supra* n.3 at 155: 'The doctrine of "implied prohibition" finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their express or necessarily implied meaning' (emphasis added).

19. On this, see, e.g., Sawyer, *Australian Federalism in the Courts*, *supra* n.16, Ch 8; Zines, *The High Court and the Constitution*, *supra* n.12 at 7-9; P.H. Lane, *The Australian Federal System*, (1979), at 966 *et seq*; P.H. Lane, *A Student's Manual of Australian Constitutional Law*, (1980), at 521-5.

20. *Engineers case*, *supra* n.3 at 145.

21. (1947) 74 C.L.R. 31.

22. Lane, *The Australian Federal System*, *supra* n.19 at 971-2, and *A Student's Manual of Australian Constitutional Law*, *supra* n.19 at 28-9.

23. The authorities to date and their statements on these doctrines are noted by Mason J. in the *Tasmanian Dam case*, *supra* n.1 at 694. On the effect of the *Melbourne Corporation case*, see, e.g., Sawyer, "Implications and the Constitution", *supra* .15; Howard, *Australian Federal Constitutional Law*, *supra* n.12 at 77-87; Zines, *The High Court and the Constitution*, *supra* n.12 at 63; W.A. Wynes, *Legislative, Executive and Judicial Powers in Australia*, (1976) at 13-5, 397-8, 402-6.

24. Coper, *supra* n.5 at 22.

in the case for restrictively interpreting Commonwealth law at the outset. In this regard, the *Melbourne Corporation case* has been analysed in a way capable of some reconciliation with the *Engineers case*. A distinction is made between the nature of a power and the extent of its operation: the *Melbourne Corporation* doctrines are meant to operate upon the incidence of a power rather than to affect the extent of a power *in abstracto*.²⁵ Accordingly, 'a head of power under s. 51 should be given its natural meaning; the exercise of the power is then subject to the express and implied prohibitions in the Constitution.'²⁶

A cautious approach to the *Melbourne Corporation case* is to be discerned in the subsequent authorities.²⁷ Where the case has been discussed, attention has been focussed on elucidating its two immunity doctrines rather than on using them as a basis for further adventures in the field of federal implications. Even the minority in the *Tasmanian Dam case* did not attempt to base their arguments on reasoning generally from the case or from any of the statements it contains. The doctrines of the *Melbourne Corporation case* themselves, though mentioned in many cases, have not been successfully invoked since their inception.²⁸ The doctrine prohibiting discrimination has the merit of precision, but does not touch a Commonwealth law general in form. It seems that the more nebulous doctrine protecting the existence of the States and their capacity to function is only available as a last resort, for Commonwealth laws normally apply to the States and s. 109 of the Constitution expressly allows those laws to override State legislative capacity. On the facts in the *Tasmanian Dam case* it was inevitable that the majority would hold that the *Melbourne Corporation case* doctrines were not applicable;²⁹ the minority did not find it necessary to examine those doctrines.

The *Melbourne Corporation case* doctrines have to be regarded as limited exceptions to the *Engineers case*, not to be further generalized. What the *Melbourne Corporation case* establishes are ultimate constitutional safeguards, not guidelines for ascertaining the meaning of particular Commonwealth heads of legislative power.

If the *Melbourne Corporation case* — the apogee of modern federal argument — does not go as far as is required by the minority position in the *Tasmanian Dam case*, it is hard to see that other authorities do so. The difficulty is in finding decisions on Commonwealth power the results of which accord with the federal reasoning and which are actually based on that

25. Wynes, *supra* n.23 at 402-3.

26. Mason J. in the *Tasmanian Dam case*, *supra* n.1 at 695, citing the recent case of *R. v. Coldham; Ex parte Australian Social Welfare Union* (1983) 47 A.L.R. 225. This view is also taken by Windeyer J. in *Victoria v. Commonwealth (The Payroll Tax case)* (1971) 122 C.L.R. 353 at 403:

The several subject matters with respect to which the Commonwealth is empowered by the Constitution to make laws for the peace, order and good government of the Commonwealth are not to be narrowed or limited by implications. Their scope and amplitude depend simply on the words by which they are expressed. But implications arising from the existence of the States as parts of the Commonwealth and as constituents of the federation may restrict the manner in which the parliament can lawfully exercise its power to make laws with respect to a particular subject matter. These implications, or perhaps it were better to say underlying assumptions of the Constitution, relate to the use of a power not to the inherent nature of the subject matter of the law.

Likewise, Walsh J. at 410 of the *Payroll Tax case*.

27. See *supra* n.23.

28. Commentators are not sanguine about the strength of the doctrines, e.g., P.H. Lane, 'The Federal Parliament's External Affairs Power: Koowarta's Case', (1982) 56 A.L.J. 519 at 523, footnote 48; Zines, *The High Court and the Constitution*, *supra* n.12 at 263; R. Anderson, 'The States and Relations with the Commonwealth', in R. Else-Mitchell (ed), *Essays on the Australian Constitution*, (1961), 93, at 105-6.

29. *Tasmanian Dam case*, *supra* n.1 at 705 (Mason J. who thought *Melbourne Corporation* would apply if the area of land affected by the Commonwealth prohibitions had formed a very large proportion of the State), at 728 (Murphy J.), at 766-8 (Brennan J. who thought *Melbourne Corporation* would apply if the Commonwealth measures operated upon the land on which stood buildings housing the principal organs of government of the State), at 823-4 (Deane J.).

reasoning. It is of interest in this regard to examine how authorities are employed by the proponents of federalism in *Koowarta* and the *Tasmanian Dam case*.

Dealing with the cases on the external affairs power of s. 51(29),³⁰ the federalists give them a narrow reading to deduce from the various judgments 'the highest common factor'.³¹ In none of the cases prior to *Koowarta* and the *Tasmanian Dam case* was it necessary to the result to adopt the broad view of the power, for each of them concerned a law which obviously had 'an external aspect'.³² But the broad view of the external affairs power was taken as far back as 1935 by Latham C.J., Evatt and McTiernan JJ., in the first case where the power was directly involved, *R. v. Burgess; Ex parte Henry (Burgess)*.³³ The later cases on the external affairs power, while adopting an attitude of caution, did not preclude the broad view, and reached results generally favourable to the Commonwealth.

When resorting to the external affairs cases to reach a result restrictive of Commonwealth power reliance has to be placed upon statements in individual or minority judgments. Reference is made to the federal reasoning of Dixon and Starke JJ. in *Burgess*, though the other three members of the Court rejected it. Some cautious remarks in *Airlines of New South Wales Pty. Ltd. v. New South Wales (Airlines (No.2) Case)*³⁴ are referred to, but in that case the Court carefully refrained from pronouncing upon the scope of s. 51(29). Passages of federal reasoning from the dissenting judgment of Stephen J. in *New South Wales v. Commonwealth (the Seas and Submerged Lands case)*³⁵ are also called in aid.

In *Koowarta*, federal considerations did finally underlie the reasons of four members of the Court, Gibbs C.J., Stephen, Aickin and Wilson JJ. But Stephen J. took a less restrictive approach to s. 51(29) than the others, and with Mason, Murphy and Brennan JJ. constituted the majority to uphold the Racial Discrimination Act 1975 (Cth). Though the broad view of the power was not accepted by a majority, it was, unlike the restrictive interpretation of Gibbs C.J., Aickin and Wilson JJ., consistent with the result of the case.³⁶ The interpretation of Stephen J. was the narrowest view consistent with the result, and was accordingly adopted by the minority in the *Tasmanian Dam case*, but it did not commend itself to any other justice and is open to serious objections.³⁷

Not many authorities apart from those on s. 51(20) itself are relied upon in discussion of that power by the proponents of federalism. While a dictum is recalled from *Spratt v. Hermes*,³⁸ that case did not deal with s. 51 powers, but with the operation of ss. 72 and 76 of the Constitution on territorial courts and matters. A statement on interpretation of s. 51 powers is cited from the judgment of Latham C.J. in *Bank of New South Wales v. The Commonwealth (the Bank Nationalization case)*:³⁹ the effect of this will be examined at a

30. It is not proposed to analyse the facts and outcomes of all the external affairs cases, but rather to observe the use to which the cases are put by the federal argument. The cases prior to *Koowarta* are examined in, e.g., Howard, *Australian Federal Constitutional Law*, *supra* n.12 at 441-60; Lane, *The Australian Federal System*, *supra* n.19 at 233-59; Zines, *The High Court and the Constitution*, *supra* n.12, Ch. 13; R.D. Lumb and K.W. Ryan, *The Constitution of the Commonwealth of Australia Annotated*, (1981), at 176-84. For a general review of the cases in the light of the *Tasmanian Dam case*, see C. Howard, 'External Affairs Power of the Commonwealth', *Current Affairs Bulletin*, Vol. 60, No. 4, 1983, 16.

31. *Koowarta*, *supra* n.6 at 449 per Stephen J.

32. *Ibid.* at 477 per Wilson J.; also see at 432 per Gibbs C.J.

33. (1936) 55 C.L.R. 608.

34. (1965) 113 C.L.R. 54. Barwick C.J. at 85 did reject the broad view of s.51(29): '[I]n my opinion, as at present advised, the mere fact that the Commonwealth has subscribed to some international document does not necessarily attract any power to the Commonwealth Parliament.'

35. (1975) 135 C.L.R. 337 at 445-6, 451-5.

36. Coper, *supra* n.5 at 7. The wide view 'may not have been established, but it could at least be said to have remained open.'

37. See *supra* n.9.

38. (1965) 114 C.L.R. 226 at 274.

39. (1948) 76 C.L.R. 1 at 184-5.

later point. Although cases on the corporations power in s. 51(20) were not directly referred to in discussion of s. 51(29), they contain some restrictive statements based on similar federal arguments, and the Commonwealth in the *Tasmanian Dam case* also relied on s. 51(20) in its effort to stop construction of the dam. What can briefly be said here is that the scope of s. 51(20) remains unresolved,⁴⁰ but that there are indications from *Actors Announcers Equity Association v. Fontana Films Pty. Ltd.*⁴¹ and the *Tasmanian Dam case*⁴² that a broad view of the power may prevail. That outcome would accord with the liberal approach taken by the Court since *R. v. Federal Court of Australia; Ex parte W.A. National Football League*,⁴³ and affirmed in the *Tasmanian Dam case*,⁴⁴ in determining what is meant by 'financial' and 'trading' as descriptions modifying the corporations within s. 51(20).

After reviewing the authorities relied upon in support of the arguments from federalism, it is reasonable to conclude that the doctrines in the *Melbourne Corporation case* represent the extent to which federal reasoning may be legitimately used with respect to Commonwealth power: 'So much and no more can be distilled from the federal nature of the Constitution and ritual invocations of 'the federal balance'.⁴⁵

Reserved Powers

The procedure required by the federal argument of construing Commonwealth legislative powers in the light of their perceived impact on State legislative authority is at odds with the basic sequence of interpretation of power laid down in the *Engineers case*.⁴⁶ To determine the extent of Commonwealth legislative powers, one first looks at the specific constitutional grants of those powers, without any preconception about the content of the State residual power. For the Constitution does not grant specific powers to the States; the States are only 'the depository of residual powers'.⁴⁷ Their powers can be determined as the residue only after the Commonwealth grants have been fully and effectively ascertained. As a result, the question under s. 51 'is always whether a particular enactment is within Commonwealth power. It is never whether it invades a State's domain'.⁴⁸

In adopting this approach, the *Engineers case* rejected the earlier doctrine of implied prohibitions or State reserved powers. That doctrine required that Commonwealth legislative powers should be narrowly interpreted in order to 'reserve' to the States as much as possible of their former or traditional authority.⁴⁹ To ascertain Commonwealth power, attention was first directed to determining whether a particular field of power was reserved to the States, free from Commonwealth 'trespass'.

40. The lineaments of this controversy may be seen from the texts, e.g., Zines, *The High Court and the Constitution*, *supra* n.12, Ch.5.

41. (1982) 40 A.L.R. 609.

42. *Supra* n.1; for the broad view, at 710-4 (Mason J.), 736 (Murphy J.), 813-6 (Deane J.); for the narrow view, at 684 (Gibbs C.J.), 756 (Wilson J.), 852-4 (Dawson J.). While Brennan J. refrained from pronouncing on the matter, his judgment in the *Fontana Films case* would seem to incline him to the broad view: see (1982) 40 A.L.R. 609 at 644-9.

43. (1979) 143 C.L.R. 190; 23 A.L.R. 439. And then *State Superannuation Board v. Trade Practices Commission* (1982) 44 A.L.R. 1; also *Fencott v. Muller* (1983) 46 A.L.R. 41.

44. By the same majority as on the external affairs point. *Supra* n.1 at 716-7 (Mason J.), 736 (Murphy J.), 788-9 (Brennan J.), 833-4 (Deane J.).

45. *Ibid.* at 694-5 per Mason J.

46. *Supra* n.3 at 154-5. (See, e.g., Lane, *The Australian Federal System*, *supra* n.19 at 966-7).

47. *Ibid.* at 150.

48. *Payroll Tax case*, *supra* n.26 at 400 per Windeyer J. For another representative statement, see the *Airlines of N.S.W. (No. 2) case*, *supra* n.34 at 143 per Menzies J.: 'Arguments based upon the extent of State legislative power, or, the extent to which that power has been exercised, to measure or confine the legislative power of the Commonwealth, must, since the *Engineers case* ((1920) 28 C.L.R. 129) fall upon deaf ears.'

49. On the effect of the doctrine, refer to the text citations, *supra* n.12.

The rejection of the doctrine of State reserved powers by the *Engineers case* was a 'fundamental and decisive event'⁵⁰ in the history of interpretation of the Constitution by the High Court. The correctness of this rejection has not been doubted, and attempts to revive the doctrine have been vigorously resisted. Any revival of the doctrine, either directly or indirectly, has now to be regarded as precluded by basic interpretative principles.

Federal Balance

Although the minority in the *Tasmanian Dam case* take care to disavow any intention of reviving the reserved powers doctrine,⁵¹ their reasoning from notions of federalism and federal balance is difficult to distinguish from that doctrine. Their reasoning is that a broad view of the power to implement international agreements under s. 51(29) would result in a situation in which the Commonwealth could affect many subject matters hitherto considered to be the preserve of the States. Yet in consequence of the *Engineers case*:

...it is quite illegitimate to approach any question of interpretation of Commonwealth power on the footing that an expansive construction should be rejected because it will effectively deprive the States of a power which has hitherto been exercised or could be exercised by them.⁵²

Essentially the minority are reading down Commonwealth power to conform to a preconceived notion of what is the proper field of power to be 'reserved' to the States in the federation. In some places the language employed by the minority is itself reminiscent of the phraseology of the era of State reserved powers. Thus Wilson J. in the *Tasmanian Dam case* refers to the 'whole range of legislative and executive authority which formerly resided in the States' being subsumed under Commonwealth law, and opines that 'a great many of their traditional functions are liable to become the responsibility of the Commonwealth'.⁵³ And Gibbs C.J. in *Koowarta* asserts that if s. 51(29) has the broad meaning contended for it, 'there would be no field of power which the Commonwealth could not invade'.⁵⁴

As used by the minority, federal balance means balancing Commonwealth power against some conception of State power, cutting down the former by reference to the latter. To determine the scope of Commonwealth powers, however, one does not 'balance' them against anything else; rather, one looks first to those express powers and interprets them fully and effectively. The federal balance, in an apposite sense, is the distribution of powers which results once Commonwealth power has been fully ascertained according to settled principles. And a most significant factor in ascertaining that distribution is the conferral on the Commonwealth of the great and important power in s. 51(29). Deane J. observes that, '...it was pursuant to that distribution that the Commonwealth was given a full and complete grant of legislative power with respect to external affairs'.⁵⁵ Where s. 51(29) is read down from its natural meaning by recourse to federal notions, the so-called balance is hardly a realistic or objective one.⁵⁶ These difficulties with a doctrine of federal balance are forcefully enunciated by Murphy J., when he says:

50. *Koowarta*, *supra* n.6 at 461 per Mason J.

51. *Supra* n.1 at 669 (Gibbs C.J.), 752 (Wilson J.), 841 (Dawson J.).

52. *Koowarta*, *supra* n.6 at 461 per Mason J. Also *Koowarta* at 472 (Murphy J.), 484 (Brennan J.). For the strictures of the majority in the *Tasmanian Dam case* regarding reserved powers reasoning, see *Tasmanian Dam case*, *supra* n.1 at 694 (Mason J.), 726-7 (Murphy J.), 722 (Brennan J.), 802 (Deane J.).

53. *Tasmanian Dam case*, *supra* n.1 at 752.

54. *Koowarta*, *supra* n.6 at 438.

55. *Tasmanian Dam case*, *supra* n.1 at 802.

56. See Mason J. in *Koowarta*, *supra* n.6 at 462: '... a realistic and objective view of the balance of powers between the Commonwealth and the States must recognize that one very important element in that balance is the committal of the external affairs power to the Commonwealth.'

There are two serious objections to this doctrine. One is that the State powers brought into the balance can only mean 'reserved State powers'. The other is that no rational argument is advanced for disregarding the particular federal power relied upon when achieving the balance. It builds upon the doctrine of reserved State powers by a fallacious method of 'balancing' those notional State powers with some only of the undoubted federal powers.⁵⁷

Notions of federalism and federal balance employed by the minority in the *Tasmanian Dam case* are inherently vague and imprecise, founded as they are on broad federal implications rather than express constitutional terms. They are susceptible of the criticisms, referred to above, which the *Engineers case* levelled at the federal implications approach of the early High Court decisions. Sometimes the language of the minority — 'the federal balance of the Constitution', the balance which the Constitution 'was intended to protect' — gives an impression that there is some objectively determinable federal balance that the Constitution requires or intends.⁵⁸ But the Constitution itself does not articulate or effect any general doctrine of federalism or federal balance. And there is no secure basis for constructing such a doctrine because, as Sawyer argues, federalism is not 'a precise set of principles either political or legal'.⁵⁹ How a federal balance is arrived at depends upon the theory of federalism held by the individual judge. Because the idea of federal balance has this variable content, a number of approaches might with equal justification be formulated as to how the balance is to be struck with respect to a particular Commonwealth legislative power. 'All manner of things may be argued to be implied' if the procedure is to find a substantive restriction on Commonwealth grants of power beyond the constitutional text altogether.⁶⁰ The idea of federal balance in itself suggests no readily ascertainable meaning for s. 51(29), it only provides a counsel of caution in requiring that a limited meaning be found. Any posited federal balance here is 'referable to no more definite standard than the personal opinion of the judge who declares it',⁶¹ and 'can satisfy only those who would make the same choice'.⁶²

The language of federal balance seems to imply a static equilibrium of Commonwealth and State legislative power, to be ascertained by reference to a distribution of power as envisaged in 1900.⁶³ But an argument from the supposed intentions of the founders of the Constitution is not effective in the context of s. 51(29). While some of the founders may have formed a narrow view of power,⁶⁴ others would seem to have contemplated for it a much wider operation.⁶⁵ What is clear though is that the phrase 'external affairs', though vague in some respects, naturally comprehends as a central concern relations with other

57. *Tasmanian Dam case*, *supra* n.1 at 727.

58. See, e.g., *Tasmanian Dam case*, *supra* n.1 at 669 (Gibbs C.J.), 752 (Wilson J.), 842 (Dawson J.); *Koowarta*, *supra* n.6 at 438 (Gibbs C.J.), 450 (Stephen J.), 481 (Wilson J.).

59. Sawyer, *Australian Federalism in the Courts*, *supra* n.16 at 121. An appreciation of this is shown by Samuels J., extra-judicially, in his 'The End of Federalism?', *The Australian Quarterly*, Autumn 1984, at 11: '“Federalism”, in particular is a slippery word of protean content, capable of meaning different things to different people and borrowing shades of meaning from the various contexts in which it may be employed.'

60. Coper, *supra* n.5 at 21.

61. *Engineers case*, *supra* n.3 at 142.

62. Coper, *supra* n.5 at 25.

63. This implication of the federal balance argument is perceived in the *Tasmanian Dam case*, *supra* n.1, by Mason, Brennan and Deane JJ. at 692, 772 and 802 respectively.

64. E.g., the view expressed in J. Quick and R. Garran, *The Annotated Constitution of the Australian Commonwealth*, Legal Books (reprint), 1976, at 631. Nevertheless, the authors admit that the external affairs power is 'a very comprehensive one' which 'may hereafter prove to be a great constitutional battleground.'

65. See the judgment of Deane J. in the *Tasmanian Dam case*, *supra* n.1 at 802, citing comments from Parkes and Deakin. Also note the views of some commentators at the time of federation — Lefroy, Jethro Brown and Harrison Moore — given in Quick and Garran, *supra* n.64.

members of the international community.⁶⁶ As a consequence, it has not since been doubted that s. 51(29), in some circumstances at least, enables international agreements to be legislatively implemented.⁶⁷ Probably the founders would have assumed that legislation to implement treaties would be limited and infrequent in scope; they would not have clearly foreseen the expansion which has occurred in international relations, as to the number of international agreements and the range of matters with which they deal.⁶⁸ But a constitutional power is not to be interpreted on the basis of mere expectations held in 1900, and any attempt to ascertain more exact intentions about the operation and scope of s. 51(29) is bound to be inconclusive. 'External affairs' is not a technical term to which a precise signification may be assigned as at 1900; rather it is a broad concept, and the power in s. 51(29) was meant to adapt to developments in Australia's role and position in the world. Only if there had been a change in the meaning of external affairs as a concept between federation and the present could an argument from the intention of the founders be mounted to restrict s. 51(29). But the negotiation, making and honouring of international agreements 'lie at the centre of a nation's external affairs and of the power which s. 51(29) confers'.⁶⁹ Any change since federation 'seems to have been a difference in frequency and volume of external affairs rather than a difference in kind'.⁷⁰

Any static or restrictive view of s. 51(29) which refuses to accept the consequences of growth and development in external affairs is ultimately inconsistent with the principle that the Constitution is an organic instrument of government designed to respond to changing circumstances and conditions. As Dixon J. maintained in *Australian National Airways Pty. Ltd. v. Commonwealth*:

... it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.⁷¹

Conformably with that principle, the expansion in external affairs is no reason for restricting s. 51(29); on the contrary, it is a reason for a broad construction to ensure an external affairs power which enables Australia as a nation to fully participate in the life of the international community.⁷² In the *Tasmanian Dam case*, Mason J. applied this reasoning to s. 51(29) in the following words:

... s. 51(29) was framed as an enduring power in broad and general terms enabling the Parliament to legislate with respect to all aspects of Australia's participation in international affairs and of its relationship with other countries in a changing and

66. For this understanding, see, e.g., *Koowarta*, *supra* n.6 at 430 (Gibbs C.J.), 448-9 (Stephen J.), 457-8 (Mason J.), 469 (Murphy J.).

67. *Ibid.* at 431 (Gibbs C.J.), 449 (Stephen J.), 458 (Mason J.); see also 470 (Murphy J.). While the executive conduct of Australia's foreign relations was handled for some years after federation by the Crown in right of the United Kingdom, it became accepted with the development of Australia's international legal personality that those relations were to be carried on by the Governor-General on the advice of Australian ministers: see L. Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth', in L. Zines (ed), *Commentaries on the Australian Constitution*, (1977), 1.

68. Accepted by Mason J. in the *Tasmanian Dam case*, *supra* n.1 at 692; also by Brennan J. in *Koowarta*, *supra* n.6 at 484.

69. *Tasmanian Dam case*, *supra* n.1 at 805 per Deane J.

70. *Ibid.* at 692-3 per Mason J. In the traditional High Court language of connotation/denotation: 'The connotation of external affairs is constant, but it denotes a widening range of subjects', per Brennan J. in *Koowarta*, *supra* n.6, at 483-4.

71. (1945) 71 C.L.R. 29 at 81.

72. As Brennan J. avers in the *Tasmanian Dam case*, *supra* n.1 at 773:

The complexity of modern commercial, economic, social and political activities increases the connections between particular aspects of those activities and the heads of Commonwealth power and carries an expanding range of those activities into the sphere of Commonwealth legislative competence. This phenomenon is nowhere more manifest than in the field of external affairs.

developing world and in circumstances and situations that could not be easily foreseen in 1900.⁷³

Power in a Series of Powers

Related to federal balance arguments is an approach which has been described as 'one power in a series of powers'.⁷⁴ Because the Commonwealth is a body of enumerated powers, it is argued, no power should be given such an operation as to render otiose the careful delimitation of powers effected by the Constitution. This approach has its *locus classicus* in *Bank of New South Wales v. Commonwealth (the Bank Nationalization case)*⁷⁵ in the judgment of Latham C.J.:

Accordingly, no single power should be construed in such a way as to give to the Commonwealth Parliament a universal power of legislation which would render absurd the assignment of particular carefully defined powers to that Parliament.⁷⁶

No one disputes that the Commonwealth is a body of enumerated powers — that is nowhere more clearly acknowledged than in the *Engineers case* itself.⁷⁷ But the doctrine suggested by Latham C.J. does not follow as an inevitable result. The doctrine of enumerated powers really requires that a Commonwealth enactment be referable to some specific head of Commonwealth power as its source of constitutional validation.⁷⁸ And whether a Commonwealth power extends to a particular subject matter should be determined according to the ordinary principles of interpretation.

In so far as 'one power in a series of powers' is invariably associated with or developed into arguments concerning federal distribution of power and federal balance it is open to the objections previously mentioned. But the dictum of Latham C.J. is now to be examined for its consequences for the grant of 'particular carefully defined powers to the Commonwealth'.

The doctrine of 'one power in a series of powers' embodies the idea of the interdependence of s. 51 powers. In support is called in aid a general rule that each provision in the Constitution should be construed in the light of other provisions.⁷⁹ That rule is of course apposite as between different sections of the Constitution. The powers in s. 51, in accordance with the opening words of s. 51, are required to be read subject to other sections of the Constitution. But it is another question whether the rule extends to the relationship of heads of power within s. 51. It has not been readily accepted that the rule applies between or among s. 51 powers.

The High Court has been reluctant to read down a specific head of power in s. 51 by reference to the notion that otherwise another of those heads would be made unnecessary or insignificant. Zines has shown that in no case since the *Engineers case* has the view been taken that the interpretation of one power should be qualified to prevent another power being rendered otiose, where the other power does not contain an express exception or limitation.⁸⁰ And the view has been rejected by some justices in an external affairs context. Despite the terms of s. 51(30) conferring power with respect to 'the relations of the Commonwealth with the islands of the Pacific', s. 51(29) embraces its content so that Commonwealth power would have been no different had s. 51(30) not been inserted: *New*

73. *Ibid.* at 693.

74. Lane, *A Student's Manual of Australian Constitutional Law*, *supra* n.19 at 41-3 and *The Australian Federal System*, *supra* n.19 at 149-51, 256-7.

75. (1948) 76 C.L.R. 1.

76. *Ibid.* at 184-5.

77. *Engineers case*, *supra* n.3 at 150, 154.

78. Wynes, *supra* n.23 at 15.

79. See, e.g., Lane, *A Student's Manual of Australian Constitutional Law*, *supra* n.19, at 41.

80. Zines, *The High Court and the Constitution*, *supra* n.12 at 19.

South Wales v. Commonwealth (the *Seas and Submerged Lands case*).⁸¹ What of the position where there is an express exception or limitation in one power, and another power is capable of an interpretation permitting the Commonwealth to legislate in the excepted or prohibited area?⁸² In the *Bank Nationalization case* it was determined that banking activities could only be controlled under the banking power of s. 51(13) and not under the corporations power of s. 51(20), the latter power being unable to override the exemption in the former for State banking wholly within the State concerned.⁸³ But in relation to the inter-State trade and commerce power in s. 51(1), s. 51(29) will sustain a law 'made with complete disregard of the distinction between inter-State and intra-State trade' which the former head of power has been held in its terms to require.⁸⁴ An issue has arisen as to whether the limitation in s. 51(10) granting power to make laws with respect to 'fisheries in Australian waters beyond territorial limits' restricts the scope of s. 51(29). While various views have been expressed on this,⁸⁵ the matter is still to be resolved.

If the High Court has shown a reluctance to cut down one head of power by reference to another, it can be said to be even more difficult to find an authoritative instance where the Court has actually conditioned a power in s. 51 by some reference to the scheme of s. 51 as a whole. The *Bank Nationalization case* itself affords no such instance of the dictum of Latham C.J. being applied in all its generality.

Earlier in his judgment in the *Bank Nationalization case*, Latham C.J. had adverted to the taxation power in s. 51(2) as a power that would have to be read down so as not to enable the Commonwealth to 'pass laws upon any subject whatsoever by imposing a tax upon specified acts or omissions'.⁸⁶ As authority to that effect, a statement from the majority judgment in *R. v. Barger*⁸⁷ was cited. But the majority reasoning in *Bargers case* was heavily influenced by the prevailing doctrine of State reserved powers, and it is generally accepted that the case would not be decided the same way today. Since *Fairfax v. Federal Commissioner of Taxation*,⁸⁸ it can be said that the dissenting judgments in *R. v. Barger* more accurately represent the law:

... Parliament has, prima facie, power to tax whom it chooses, power to exempt whom it chooses, power to impose such conditions as to liability or as to exemption as it chooses.⁸⁹

The High Court determines whether a measure is in substance a law 'with respect to' taxation not by restricting the subjects that may be taxed but by examining the nature of the duties, obligations or liabilities the measure imposes.⁹⁰ In this process of characterization, the motives of the legislature and the consequential effects of the law are immaterial. The criterion is one of legal liability: 'the substance of the enactment is the obligation which it imposes'.⁹¹ Where the only obligation imposed is to pay taxation, the law is one with respect to taxation under s. 51(2).

81. *Supra* n.35 at 471 (Mason J.), 497 (Jacobs J.).

82. The authorities here are discussed in Zines, *The High Court and the Constitution*, *supra* n.12 at 20-21; also Lane, *A Student's Manual of Australian Constitutional Law*, *supra* n.19 at 42.

83. *Bank Nationalization case*, *supra* n.75 at 203-4 (Latham C.J.), 256 (Rich and Williams JJ.), 304 (Starke J.).

84. *Airlines of New South Wales Pty. Ltd. v. New South Wales* (No. 1) (1964) 113 C.L.R. 1 at 27 per Dixon C.J.; also *Airlines of N.S.W. (No. 2) case*, *supra* n.34 at 82, 85-6, 87 (Barwick C.J.), 118 (Kitto J.), 139-40 (Menzies J.).

85. The various views in the authorities are analysed in J. Fajgenbaum and P. Hanks, *Australian Constitutional Law*, (1980), at 335-7; Zines, *The High Court and the Constitution*, *supra* n.12 at 20-1.

86. *Bank Nationalization case*, *supra* n.75 at 183.

87. (1908) 6 C.L.R. 41 at 77 per Griffith C.J., Barton and O'Connor JJ.

88. (1965) 114 C.L.R. 1.

89. *Bargers case*, *supra* n.87 at 114 per Higgins J.; and also see at 94 per Isaacs J.

90. *Fairfax case*, *supra* n.88.

91. *Ibid.* at 13 per Kitto J.

In *Koowarta*, Gibbs C.J. argued⁹² that the approach of Latham C.J. had been applied to the defence power of s. 51(6), citing a passage from *R. v. Foster*⁹³ about the dangers to federalism if s. 51(6) were regarded as a 'general power of making laws' at any time on any matter the character of which had been affected by World War II. But *Foster's case* is not an instance of federal reasoning leading to a result not otherwise to be reached. The case can be explained according to the accepted principles of characterization associated with s. 51(6); the Court itself proceeded to determine the case on those principles. It is accepted that for a law to be 'with respect to' defence there must be a real connection between the law concerned and the defence of Australia.⁹⁴ And the defence power is purposive, expanding to meet the exigencies of defence at any time, but contracting as they abate.⁹⁵ So the power in s. 51(6) is a power for defence purposes, not one to deal with every conceivable consequence of a war, however indirect or remote. As *Foster's case* puts it, 'The Constitution does not confer upon the Commonwealth Parliament any power in express terms to deal with the consequences of war . . .'⁹⁶ But the defence power may extend to any subject matter, provided the law furthers a defence purpose or is incidental to the exercise of the power: 'its application depends on facts, and, as those facts change, so may its actual operation as a power enabling the legislature to make a particular law'.⁹⁷

Overall, it can be said the authority in support of the power in a series of powers approach is quite meagre. Though Lane refers to the dictum of Latham C.J. as a rule of construction, he admits that the High Court has not applied it in recent years.⁹⁸ The power in a series of powers approach is inconsistent with, and has deferred to, the established principle of interpretation which requires that each of the powers in s. 51 be read independently of the others. As Latham C.J. himself said in another case, 'The paragraphs of s. 51 should not . . . in general be read as limiting each other in any way'.⁹⁹ Furthermore, the external affairs power in s. 51(29) has been acknowledged from *Burgess* onwards to be an independent head of power. In *Burgess*, Latham C.J. saw no reason why s. 51(29) 'should not be given its natural and proper meaning, whatever that may be, as an independent express legislative power'.¹⁰⁰ While admitting the independent nature of the external affairs power, Gibbs C.J. in the *Tasmanian Dam case* suggested that the proposition did not go far in providing an answer to the operation of the power.¹⁰¹ But the proposition does seem to preclude the power in a series of powers approach. As well, it tends more readily to the view that a full reading of s. 51(29) should be given, unqualified by other doctrines which might derogate from the independence of the power.

End of Federalism?

The gravamen of the federal balance and power in a series of powers arguments is that if some restriction is not placed on s. 51(29), the very preservation of the federal nature of the Constitution, the maintenance of a federal polity, is imperilled. For, it is argued, the Commonwealth could by entering into international agreements on matters of domestic

⁹² *Koowarta*, *supra* n.6 at 438-9.

⁹³ (1949) 79 C.L.R. 43 at 83. Gibbs C.J. also referred to a general dictum from Dixon J. in *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 at 203 to the effect that the federal nature of the Constitution is maintained during war time.

⁹⁴ *Dawson v. Commonwealth* (1946) 73 C.L.R. 157 at 173.

⁹⁵ *Stenhouse v. Coleman* (1944) 69 C.L.R. 457 at 471-2.

⁹⁶ *Foster's case*, *supra* n.93 at 83. Laws dealing with the direct consequences of war may come within the defence power, but on the basis that they are incidentally involved in the full exercise of the power.

⁹⁷ *Andrews v. Howell* (1941) 65 C.L.R. 255 at 278.

⁹⁸ Lane, *A Student's Manual of Australian Constitutional Law*, *supra* n.19 at 42.

⁹⁹ *Johnston Fear and Kingham and Offset printing Press Pty. Ltd. v. Commonwealth* (1943) 67 C.L.R. 314 at 317.

¹⁰⁰ *Burgess*, *supra* n.33 at 639; likewise Evatt and McTiernan JJ. at 684-7.

¹⁰¹ *Tasmanian Dam case*, *supra* n.1 at 667.

concern attract under s. 51(20) a universal power of legislation, sustaining laws for the peace, order and good government of Australia with respect to any subject.¹⁰² This is a large and serious claim, the broad view of s. 51(20) being regarded as a threat to the existence of the federal system itself because of the comprehensive and unlimited operation it gives to the power.

But it can be rejoined that the external affairs power of s. 51(29) is not comprehensive or unlimited: it is subject to overriding constitutional limitations, express and implied, and to limitations inherent in the nature of the power and how it operates. Though acknowledging the existence of limitations, the proponents of the federal arguments deny that they are efficacious enough to maintain federalism. An evaluation of the efficacy of the limitations on s. 51(29) is required.

From the authorities the following limitations on s. 51(29) are to be discerned:

- (1) Like other grants of power in s. 51, s. 51(29) is subject to the express limitations in the other provisions of the Constitution.¹⁰³
- (2) The power in s. 51(29), again as with other Commonwealth powers, is subject to those implied limitations derived from the *Melbourne Corporation case*.¹⁰⁴
- (3) An international agreement to be implemented under s. 51(29) must be *bona fide* and genuine; the agreement must not be a colourable device solely entered into by the Commonwealth to gain legislative power over a subject matter.¹⁰⁵
- (4) A law giving effect to an international agreement by way of s. 51(20) must conform to the agreement if the subject of the agreement is not independently a matter of external affairs.¹⁰⁶

Admittedly, limitations (2) and (3) are not very strong, but (1) and (4), it is suggested, are significant restraints on power.

The restricted operation of the two *Melbourne Corporation case* doctrines has already been noted — the prohibition on discrimination is avoided by legislation in general terms, and the protection of the existence and capacity of the States is only available in ultimate situations.

The requirement of *bona fides* is difficult to invest with much substance. It is hard to know how an absence of *bona fides* could be detected: it would not be enough to show that the Commonwealth when entering into the agreement was aware that it would not have

102. *Ibid.* at 669 (Gibbs C.J.), 752 (Wilson J.), 842 (Dawson J.); *Koowarta*, *supra* n.6, at 438 (Gibbs C.J.), 450 (Stephen J.), 481 (Wilson J.).

103. *Burgess*, *supra* n.33 at 642-3 (Latham C.J.), 658 (Starke J.), 687 (Evatt and McTiernan JJ.); *Airlines of N.S.W. (No. 2) case*, *supra* n.34 at 85, 87 (Barwick C.J.), 118 (Kitto J.), 165 (Owen J.); *Koowarta*, *supra* n.6 at 432-3 (Gibbs C.J.), 450 (Murphy J.), 480 (Wilson J.); *Tasmanian Dam case*, *supra* n.1 at 667 (Gibbs C.J.), 695 (Mason J.), 801 (Deane J.).

104. *Burgess*, *supra* n.33 at 658 (Starke J.); *Airlines of N.S.W. (No. 2) case*, *supra* n.34 at 85 (Barwick C.J.); *Koowarta*, *supra* n.6 at 433 (Gibbs C.J.), 452 (Stephen J.), 460 (Mason J.), 470 (Murphy J.), 481 (Wilson J.); *Tasmanian Dam case* *supra* n.1 at 667 (Gibbs C.J.), 695 (Mason J.), 801 (Deane J.).

105. *Burgess*, *supra* n.33 at 642 (Latham C.J.), 658 (Starke J.), 669 (Dixon J.), 687 (Evatt and McTiernan JJ.); *Airlines of N.S.W. (No. 2) case*, *supra* n.34 at 85 (Barwick C.J.); *Koowarta*, *supra* n.6 at 439 (Gibbs C.J.), 453 (Stephen J.), 459, 464 (Mason J.), 487-8 (Brennan J.). The requirement of *bona fides* is not really discussed in the *Tasmanian Dam case*, *Koowarta* having already provided the occasion for its discussion.

106. *Burgess*, *supra* n.33 at 646 (Latham C.J.), 659-60 (Starke J.), 674 (Dixon J.), 688 (Evatt and McTiernan JJ.); *R. v. Poole; Ex parte Henry (No. 2)* (1939) 61 C.L.R. 634; *Airlines of N.S.W. (No.2) case*, *supra* n.34 at 82 (Barwick C.J.), 102 (McTiernan J.), 118 (Kitto J.), 126 (Taylor J.), 141 (Menzies J.); *Tasmanian Dam case*, *supra* n.1 at 671-4 (Gibbs C.J.), 695-7 (Mason J.), 730 (Murphy J.), 781-3 (Brennan J.), 805-6 (Deane J.), 850 (Dawson J.). As it was admitted in *Koowarta* that the Racial Discrimination Act 1975 (Cth) gave effect to the Convention, the conformity requirement received only passing mention there.

power to deal with the subject matter otherwise than by recourse to s. 51(29).¹⁰⁷ Another difficulty is how the issue could be cognizable in a court of law, in view of the principle that *mala fides* or improper purpose may not be attributed to the Crown when exercising executive power.¹⁰⁸ In *Koowarta* this limitation was met with some scepticism,¹⁰⁹ and was not much discussed in the *Tasmanian Dam case*.

That s. 51(29) is subject to other sections of the Constitution means that the scheme of governmental arrangements laid down in the Constitution will not be dramatically disturbed by a broad reading of the power. Advocates of the restrictive view of s. 51(29), with respect, underestimate the efficacy of the express terms of the Constitution in maintaining the constitutional order and denying s. 51(29) the character of a universal power of legislation. In *Koowarta* itself a number of sections were mentioned¹¹⁰ which would materially condition the operation of the external affairs power: ss. 80, 92, 99, 113, 114, 116, 117 and 128. More comprehensively, it has been argued above that the Constitution by the operation of its express terms can reasonably be said to have constituted its own definition of federalism. As a result, the system of express constitutional provisions based on the federal nature of the polity cannot be destroyed by the Commonwealth legislating under s. 51(29).

The need for conformity to the international agreement is an inherent limitation of some consequence to the scope of s. 51(20). This conformity limitation receives in the *Tasmanian Dam case* various related statements, which when taken together evince a real effect. The law implementing the international agreement must be such as to 'conform to the treaty and carry its provisions into effect',¹¹¹ it must be found 'conducive' to the end of the Convention,¹¹² the legislative power is confined to 'what may reasonably be regarded as appropriate'¹¹³ for the implementation of the agreement, what is 'capable of being reasonably considered to be appropriate and adapted to achieving'¹¹⁴ the purpose of the agreement. Furthermore it has been suggested that there has to be a 'reasonable proportionality' between the purpose or object of the agreement and the legislative measures for achieving or procuring it.¹¹⁵ That the conformity limitation is to be taken seriously is demonstrated by the difference of opinion among the majority in the *Tasmanian Dam case* as to how it should operate there. While Mason and Murphy JJ. thought that the prohibitions in s. 9 of the World Heritage Properties Conservation Act 1983 (Cth) were

107. *Koowarta*, *supra* n.6 at 439 per Gibbs C.J. And as Lane suggests in *The Australian Federal System*, *supra* n.19 at 255, (referring to Evatt and McTiernan JJ. in *Burgess*, *supra* n.33 at 687): 'The Commonwealth could refute the charge by pointing out that while it may have taken over a 'State' matter it has also subjected itself to international obligations, involving itself in the furnishing of reports, the inconveniences of membership in an international organization, and so on.'

108. For statement of the principle see, e.g., *Australian Communist Party v. Commonwealth* (1951) 83 C.L.R. 1 at 178-80, 221-2, 257-8; *W.H. Blakeley Co. Pty. Ltd. v. Commonwealth* (1953) 87 C.L.R. 501 at 513, 521. For the difficulty it poses for argument as to absence of *bona fides* in connection with s. 51(29), see Zines, *The High Court and the Constitution*, *supra* n.12 at 222; Lane, *The Australian Federal System*, *supra* n.19 at 98.

109. See the discussion in Coper, *supra* n.4 at 10; refer to *Koowarta*, *supra* n.6 at 439 (Gibbs C.J., with whom Aickin and Wilson JJ. agreed), 459, 464 (Mason J.); Stephen J. (at 453) and Brennan J. (at 487-8) only referred to the limitation in passing.

110. See variously in *Koowarta*, *supra* n.6 at 432 (Gibbs C.J.), 450 (Stephen J.), 480 (Mason J.), 470 (Murphy J.), 480 (Wilson J.).

111. *Tasmanian Dam case*, *supra* n.1 at 697 per Mason J.

112. *Ibid.* at 782 per Brennan J.

113. *Ibid.* at 730 per Murphy J.

114. *Ibid.* at 805-6 per Deane J.

115. *Ibid.* at 806 per Deane J.:

Thus, to take an extravagant example, a law requiring that all sheep in Australia be slaughtered would not be sustainable as a law with respect to external affairs merely because Australia was a party to some international convention which required the taking of steps to safeguard the spread of some obscure sheep disease which had been detected in sheep in a foreign country and which had not reached these shores.

reasonably appropriate for giving effect to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Brennan and Deane JJ. decided that the prohibitions in that section, with the exception of s. 9(1)(h) (the doing of any prescribed act of dam construction), were too wide.¹¹⁶

Though the limitation does not restrict the range of subject matters within the power of treaty implementation in s. 51(29), it clearly affects in a substantial way the extent to which these subject matters may be dealt with. The extent of the power is dependent upon a complex of factors going to the character of the international agreement concerned. Such factors include:¹¹⁷

- (a) the nature of the ends or purposes envisaged in the agreement;
- (b) the style of the agreement and its mode of expression;
- (c) whether the agreement imposes obligations or provides benefits;
- (d) the nature of those obligations or benefits;
- (e) whether the obligations or benefits are specific or general;
- (f) the depth of involvement of the agreement in a subject matter:
whether minimal guidelines or detailed regulations are required, whether tangible or intangible benefits are provided;
- (g) the breadth of the subject matter of the agreement: whether the agreement covers a large field of activity or a restricted one;
- (h) whether large elements of discretion or value judgment are allowed the parties to the agreement;
- (i) whether the agreement is bilateral or multilateral;
- (j) whether or not the provisions of the agreement are declaratory of international law.

All these factors show that s. 51(29) does not admit of the general regulation of the subject matter to which the international agreement relates.

The concern for the survival of federalism felt by the minority in the *Tasmanian Dam case* ultimately appears founded on what they conceive to be the realities of federal relationships and political power under a s. 51(20) regime.¹¹⁸ But their analysis is throughout a juristic one which does not take account of the very real political constraints on the exercise of the power. While the existence of a formal constitutional power has been declared by the High Court, the extent of its exercise depends on the political environment in which the Commonwealth operates.

Any assumption that the States are defenceless against the encroachments of the external affairs power ignores the whole dynamic of Federal-State relations. Howard has strongly argued that it has been the power of the States, rather than constitutional impediment, that has been responsible for the reluctance of the Commonwealth to act unilaterally under s. 51(29):

... if the Commonwealth relies on its international commitment to enact legislation on a matter that the states have traditionally regarded as their own business, the states have more than enough constitutional power in other areas, or in indirect ways, to make it too politically discouraging to proceed.¹¹⁹

Though the *Tasmanian Dam case* instances that the Commonwealth can effectively employ s. 51(29) despite State opposition, the political costs involved in conflicts with the States ensure that the power will not become a routine device to acquire a universal

116. *Ibid.* at 705-9 (Mason J.), 735-6 (Murphy J.), 785-8 (Brennan J.), 811-3 (Deane J.).

117. A number of these factors are identified by Mason J., *ibid.* at 696.

118. *Ibid.* at 669 (Gibbs C.J.), 752 (Wilson J.), 842-3 (Dawson J.).

119. C. Howard, 'The Constitution as a Legal Document' in H. Mayer and H. Nelson (eds), *Australian Politics, A Fifth Reader*, (1980) 143 at 146.

legislative jurisdiction. The States are vigorous units within the Australian federation, not slow to employ the rhetoric of 'States' rights' against the national government where an 'interference' with their functions and powers is perceived.¹²⁰ In recent years, it has been noted that the balance of political power has if anything shifted to the States as a result of the success their governments have achieved in mobilizing support for 'States' rights'.¹²¹ The States have enjoyed greater political bargaining power because of their ability to exploit a range of resources available to them in the areas of jurisdiction, finance, party, regionalism, bureaucracy and information, and manoeuvrability.¹²²

In the ultimate the Commonwealth may legislate unilaterally to implement international agreements where it perceives the need for such action in the interests of Australia's international relations and is prepared to face the political repercussions. Often though, it will be prudent for the Commonwealth to attempt some measure of co-operation with the States so that the ends of any international agreement are attained in the most efficient and equitable way possible.¹²³ There always exists the opportunity for consultation and negotiation between Commonwealth and States as to whether and how s. 51(29) should be exercised. The development of the Australian federation has been marked by extension of governmental activities and a commingling of functions and responsibilities between Commonwealth and States; the resulting interdependence of governments and the need for policy co-ordination emphasize that there are advantages to be gained by the Commonwealth from co-operative undertakings.¹²⁴ And when the Commonwealth endeavours to discharge its obligations under an international agreement there may in many circumstances remain ample room for 'the maintenance of individual State standards of administration and of individual State laws'.¹²⁵

The legal and political restraints on the exercise of the external affairs power mean that government by treaty is not a viable option for the Commonwealth. Even if there is some decrease in the area of 'exclusive' State legislative competence, the Australian constitutional system remains quite recognizably federal. Once that is admitted, the minority position in the *Tasmanian Dam case* may be finally regarded as an argument not against an unlimited external affairs power but against a broad operation of the power on its full and natural meaning. But the basic principle of interpretation of Commonwealth powers, the correctness of which has not been doubted since the *Engineers case*, is that grants of power

120. See, e.g., K. Wiltshire, 'Setting State Priorities: The Role of the States in Public Policy', in R. Mathews (ed), *Making Federalism Work*, (1976) 97, esp. at 98-103.

121. R. Mathews, 'Issues in Australian Federalism', *Quadrant*, February 1978, 13 at 22.

122. The typology is from the article by C. Sharman, 'Fraser, the States and Federalism', *The Australian Quarterly*, Autumn 1980, 9. Sharman believes that as a result of these resources 'the States can continue to outpoint the Commonwealth in most political contests': at 10. Sharman's argument is taken up and supplemented by D. Solomon, 'Constitution and Politics: Conflict Constrained', in J. Aldred and J. Wilkes (eds), *A Fractured Federation? Australia in the 1980's*, (1983), 63. Refer also to the works cited in footnotes 120 and 121 *supra*, and to B. Head, 'The Political Crisis of Australian Federalism', in A. Patience and J. Scott (eds), *Australian Federalism: Future Tense*, (1983), 75, esp. at 81-6. For a recognition from a State Premier of some of the political resources of the States and his view that the *Tasmanian Dam case* should be considered in a political rather than a legal context, see B. Burke, 'Federalism after the Franklin', *The Australian Quarterly*, Autumn 1984, 4.

123. 'Since the states will not disappear overnight, the Commonwealth must learn to live with them. It cannot afford to give them the continual impression that "Big Brother knows best". It is more prudent sometimes to show respect for their claim to co-equal status': H. Emy, *The Politics of Australian Democracy*, (1978), 93.

124. R. Mathews, 'Issues in Australian Federalism', *supra* n.121 at 12-14.

125. The phraseology is from R. Else-Mitchell, talking of the need for uniformity developing in the federation in 'Unity or Uniformity' in Aldred and Wilkes, *supra* n.122, 1 at 18.

in s. 51 should be construed broadly and liberally, not narrowly and pedantically.¹²⁶ The Commonwealth represents Australia as a nation throughout the world and carries on the conduct of our relations with other countries. Its external affairs power being 'an enduring power in broad and general terms'¹²⁷ should be 'appropriate and adequate to enable the Commonwealth to discharge Australia's responsibilities in international and regional affairs'.¹²⁸ And, as earlier stated, the expansion in international relations this century argues not for limiting s. 51(29) but for broadly construing it so that it responds to the needs and position of Australia in the developing world community. The power in s. 51(29) accordingly should be regarded as conferring on the Commonwealth a full capacity to legislate with respect to external affairs.

The decision on whether Australia should comply with its international obligations must ultimately rest with the national government, not with each of the States. It seems a logical outcome that the level of government which enters into international agreements executively should be the one able to implement them legislatively.¹²⁹ A divided constitutional competence between Commonwealth and States would here be productive of uncertainty and hardly conducive to vigorous responses. While co-operation between Commonwealth and States in some matters of external affairs may be desirable, if the Commonwealth were compelled to wait on all the States, the conduct of external affairs would be characterized by indecision and frustration.¹³⁰ If the Commonwealth were unable to implement its international agreements, the standing and reputation of Australia in the international community would be prejudiced.¹³¹ The nation could not speak with assurance or moral force in international fora if it could not back up its words with legislative action and discharge its obligations to other countries under international law.

The Future: Conclusion

After the *Tasmanian Dam case*, the States will continue to exist and exercise as before their wide executive and legislative functions. Over time the external affairs power will allow the Commonwealth to extend its influence in areas of State activity formerly regarded by the States as exclusive. The power will however be only one weapon in the Commonwealth's armoury of constitutional and financial powers; it will but contribute to the gradual process of expansion of Commonwealth authority discernible over the last

126. Among many statements of the principle, see *James v. Commonwealth* (1936) 55 C.L.R. 1 at 43; *R. v. Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty. Ltd.* (1964) 113 C.L.R. 207 at 225-6. An influential pre-*Engineers'* statement, cited in the *Tasmanian Dam case*, *supra* n.1, by Mason J. at 693 and Brennan J. at 772, occurs in *Jumbunna Coal Mine N.L. v. Victorian Coal Miner's Association* (1908) 6 C.L.R. 309 at 367-8 per O'Connor J.:

'[I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.'

127. *Tasmanian Dam case*, *supra* n.1 at 693 per Mason J.

128. *Koowarta*, *supra* n.6 at 462 per Mason J.

129. This consideration does not determine the conclusion (*Koowarta*, *supra* n.6 at 482, 484 per Brennan J.), but it fortifies the conclusion reached on the *Engineers'* canons of interpretation.

130. See Mason J. in *Koowarta*, *supra* n.6; at 460, 'Such a division of responsibility between the Commonwealth and each of the States would have been a certain recipe for indecision and confusion, seriously weakening Australia's stance and standing in international affairs'; and at 462, 'It is unrealistic to suggest in the light of our knowledge and experience of Commonwealth-State co-operation and of co-operation between the States that the discharge of Australia's international obligations by legislation can be safely and sensibly left to the States acting uniformly in co-operation.'

131. Cf. Murphy J. *ibid.* at 471.

half-century. The power presents an opportunity to the Commonwealth to harmonize domestic laws with international norms, to give effect to external standards of justice and fairness. But use of the power will be selective, not indiscriminate, and it is hard to see s. 51(29) admitting of detailed regulation of all aspects of behaviour. This is hardly the end of federalism.¹³²

For important constitutional decisions such as the *Tasmanian Dam case*, the law professors remind us that there exists a store of concepts and doctrine from which material may be taken to construct either the majority or minority argument.¹³³ But that does not mean that either result, since arguable, is equally persuasive. It is submitted that no federal argument from either principle or precedent is weighty enough to displace the broad view of s. 51(29), founded as that view is on the established canons of interpretation derived from the *Engineers case*.*

132. Such a conclusion is also arrived at by Coper, *supra* n.5 at 25-6; Goldring, *supra* n.5 at 159-60; Howard, 'External Affairs Power of the Commonwealth', *supra* n.30 at 24; Zines, 'Implications of the Tasmanian Dam case', *supra* n.5 at 218.

133. Sawyer, *Australian Federalism in the Courts*, *supra* n.16 at 96-7; Zines, *The High Court and the Constitution*, *supra* n.12 at 306-9, and 'Implications of the Tasmanian Dam case', *supra* n.5 at 218; Coper, *supra* n.5 at 23.

*This paper was prepared in May 1984. Events since that date have not caused the author to change any of his opinions as to the theory and practice of s. 51(29).